Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
1998 Biennial Regulatory Review - Streamlining of Mass Media Applications, Rules, and Processes	)	MM Docket No. 98-43
	)	
Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities	)	MM Docket No. 94-149

To: The Commission

PETITION FOR RECONSIDERATION

ASPEN FM, INC.
CALIPATRIA BROADCASTING COMPANY, L.L.C.
RANCHO PALOS VERDES BROADCASTERS, INC.
ENTRAVISION HOLDINGS, LLC

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Date: January 19, 1999

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SUMMARY

The recently announced rules modifying the length of and procedures for the extension of broadcast facility construction permits should be reconsidered as they violate the law on a number of grounds and also have unanticipated practical effects.

The rules differ so significantly from those announced in the notice of proposed rulemaking that a new notice and comment period is required because the notice provided interested parties was insufficient. The application of the rules to construction permits secured and extended under the existing rules violates the law due to the Administrative Procedure Act's prohibition on retroactive rulemaking. The rules also amount to a taking without compensation in violation of the Federal Constitution. The practical effects of the new rules, which appear not to have been considered by the Commission, mitigate against their application. Considering all of the failings attendant to these rules, reconsideration is both necessary and proper in this matter.

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INTRODUCTION

Aspen FM, Inc., Calipatria Broadcasting Company, L.L.C., Rancho Palos Verdes Broadcasters, Inc., and Entravision Holdings, LLC (collectively "Petitioners"), by and through their counsel, and pursuant to Section 1.429 of the Commission's Rules, hereby file a Petition for Reconsideration ("Petition") of In the Matter of 1998 Biennial Regulatory Review- Streamlining of Mass Media Applications, Rules and Processes - Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, released November 25, 1998 ("Rulemaking").[1]

Petitioners specifically request reconsideration of Paragraphs 77-90 of the Rulemaking. These Paragraphs deal with the length of time of broadcast facility construction permits, both those in existence and those to be issued following the effective date of the Rulemaking, and procedures for requesting their extension. In support of the Petition, Petitioners state as follows:

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[1] This Petition is timely filed as the Rulemaking was published in the Federal Register on December 19, 1998. 63 Fed. Reg. 70040 (1998).

BACKGROUND

THE EXISTING RULES

A license for the operation of a broadcast facility may not issue unless a construction permit has first been granted. 47 U.S.C. § 319. Construction permits presently allow 18 months for radio and low-power television facilities and 24 months for television facilities to be completed following the grant of a permit. 47 C.F.R. 73.3598(b). Extensions of six to twelve months may be granted upon a showing of cause. 47 C.F.R. 73.3534(b).[2] Among the circumstances sufficient to cause the grant of an extension are where "[n]o progress has been made for reasons clearly beyond the control of the permittee (*such as delays caused by* governmental budgetary processes and *zoning problems*) but the permittee has taken all possible steps to expeditiously resolve the problem and proceed with construction." 47 C.F.R. 73.3534(b)(3) (emphasis added). See, e.g., Aspen FM, Inc., 6 FCC Rcd 1602 (1997).

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[2] The rule presently governing extensions states:

> Applications for extension . . . will be granted only if one of the following three circumstances have occurred:
>
> (1) Construction is complete and testing is underway looking toward prompt filing of a license application;
>
> (2) Substantial progress has been made i.e., demonstration that equipment is on order or on hand, site acquired, site cleared and construction proceeding toward completion; or
>
> (3) No progress has been made for reasons clearly beyond the control of the permittee (such as delays caused by governmental budgetary processes and zoning problems) but the permittee has taken all possible steps to expeditiously resolve the problem and proceed with construction.

47 C.F.R. 73.3534(b).

THE NEW RULES

The Rulemaking adopts a nearly absolute three-year limit on the length of construction permits, with very limited allowances for extensions. Rulemaking at ¶83. The only circumstances when the three-year period may be extended is when the permittee has been encumbered by administrative review, judicial review, or an act of God. Id.[3] Construction permits granted over three years ago and presently under a valid extension will be subject to automatic forfeiture if construction has not been completed by the expiration of the latest extension. Rulemaking ¶¶80, 84, 89(2).

PETITIONERS

Aspen FM, Inc. ("Aspen") is the permittee of Station KPVW(FM), Aspen, Colorado. On May 19, 1992, Aspen was granted a construction permit by the Commission. On April 6, 1998, Aspen filed for an extension of its previously extended construction permit. That application, contested by a third party, is presently pending before the Commission.

Calipatria Broadcasting Company, L.L.C. ("Calipatria") is the permittee of Station KAJB(TV), Calipatria, California. On June 10, 1994, Calipatria was granted a construction permit by the Commission. An application requesting a transfer of control was granted on December 16, 1997, and this ownership change was consummated on January 9, 1998. Under the Commission's Rules, Calipatria had one year from consummation date to complete construction. Calipatria filed for an extension on January 15, 1999. That application is presently pending before the Commission.

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[3] See infra, p. 10, n. 5.

Rancho Palos Verdes Broadcasters, Inc. ("RPVB") is the permittee of Station KRPA(TV), Rancho Palos Verdes, California. On July 22, 1985, RPVB was granted a construction permit by the Commission. On December 28, 1998, RPVB filed for an extension of its previously extended construction permit. That application is presently pending before the Commission.

Entravision Holdings, LLC ("Entravision") is the permittee of Stations K05JY and K28ET, low power television stations authorized to Indio and Palm Springs, California. On January 26, 1994, Entravision was granted a construction permit for K05JY by the Commission. An extension of these permits was granted on August 7, 1998. That extension expires on February 7, 1999.

ARGUMENT

I THE RULE ADOPTED IN THE RULEMAKING DIFFERS SO SIGNIFICANTLY FROM THE PROPOSED RULE THAT A NEW NOTICE AND COMMENT PERIOD IS REQUIRED

In the Notice of Proposed Rulemaking, 13 FCC Rcd 11349 (1998) ("NPRM"), the Commission stated in the Paragraph entitled "Application of New Rules to Outstanding Permits," that:

> We believe, however, that it would be administratively unworkable to apply the proposed rules to construction permits that are already beyond their initial construction periods (whether through extension, assignment, transfer of control, or modification). Because many of these permits have already been afforded a construction period close to (or, in many instances, in excess of) the three-year term proposed in this Notice, ***we propose to continue to apply the rules as they exist today to permits outside of their initial periods***. We invite comment on the tentative conclusion that it is more appropriate to continue to apply our current rules to construction permits that are beyond their initial periods.

Id., at ¶68 (emphasis added).

Yet in the Rulemaking, in the section entitled "Permittee is authorized to construct under an extension of its construction permit," the Commission stated:

> The current extension, as an outstanding permit, will be extended to three years from the initial grant of the construction permit, upon request of the permittee submitted in accordance with the time frames described *supra*. In addition, a permittee may submit a showing requesting additional time based on the tolling procedures described herein. ***No additional time will be granted when the permittee has had, in all, at least three unencumbered years to construct. The construction permit will be subject to automatic forfeiture at the expiration of the last extension.***

Rulemaking at ¶89(2) (emphasis added).

Thus, the final rule adopted in the Rulemaking is a 180-degree departure from that proposed in the NPRM. The NPRM stated that the Commission would continue to apply its existing rules to "permits outside of their initial period," without any reference to how far from the date of initial grant these permits might be. NPRM at ¶68. This would have allowed permittees operating under extended construction permits to continue to receive, upon a showing of cause, further extensions, without regard to the age of their permits. However, the Rulemaking states that the Commission will apply a three-year limit, running from the date of the initial permit grant, to permittees already holding extended permits. Rulemaking at ¶89(2). This will result in the automatic forfeiture of construction permits operating under extensions where those permits are over three years from the date their initial permit grant, whether or not the permittees have heretofore complied with and remain in compliance with the provisions of 47 C.F.R. 73.3534(b). This radical departure of the final rule from the proposed rule violates the notice and comment provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. 551, et. seq., and, thus, cannot be implemented without a new notice and comment period.

The APA provides that"[g]eneral notice of proposed rule making . . . shall include . . . either the terms or substance of the proposed rule or a description of the subjects and issues

involved." 5 U.S.C. 553(b)(3). This requirement that "terms or substance" of a proposed rule must be described means that where a final rule adopted by a federal agency is radically different from the proposed rule, a new notice and comment period must be given. The courts have utilized two tests to determine if a new notice and comment period is mandated: (1) whether the final rule is a *logical outgrowth* of the comments submitted during the rulemaking process; and (2) whether a notice of proposed rulemaking *fairly apprised* interested parties so they had an opportunity to comment. See, e.g., BASF Wyandotte Corp., et. al. v. Costle, et. al., 598 F.2d 637 (1st Cir. 1979), cert. denied, 444 U.S. 1096 (1980); Pennzoil Co. v. Federal Energy Regulatory Commission, 645 F.2d 360, cert. denied, 454 U.S. 1142 (1982). Due to the radical departure of the final rule from the proposed rule, which gave parties such as Petitioners no cause to participate in the proceedings, the Commission fails to satisfy either test.

Courts have found that notice is adequate if the proposed rule differs from the final rule only if the final rule is a "logical outgrowth" of the notice to the public. In BASF, supra, 598 F.2d 637, the First Circuit justified the departure of a final rule from the proposed rule because the departure was in *direct response* to submissions by commentors. In that manner, the Court found the APA's goal of ensuring "meaningful public participation in agency proceedings" had been satisfied. Id., at 642-43. However, in the matter at hand, nowhere in the Rulemaking does the Commission indicate that its departure from the NPRM in regard to permits under extension was in response to comments filed by the public. In fact, the only references made by the Commission to comments are to those comments filed by parties opposing such a change. See infra, p. 10, n. 5. Thus, service of the APA's goals, based on comments filed, cannot be claimed.

Even if a change is made in direct response to comments, the APA may still be violated. In Chocolate Manufacturers Association v. Block, 755 F.2d 1098 (4th Cir. 1985), the Fourth Circuit instructed the Department of Agriculture to reopen its comment period because the final rule was such a *substantial departure* from the proposed rule it could not be said to be a logical outgrowth therefrom, and hence notice was inadequate. The final rules in that matter had deleted, in response to comments, a requirement that had been included in the proposed rules. Id., at 1101-02. The Court stated that the change was not in character with the original scheme to the degree that the change did not allow the agency to fulfill the purposes of the APA: allowing the agency to benefit from the experience and input of parties filing comments. Id., at 1103. The Court concluded that an agency does not have "carte blanche" to establish rules contrary to original proposals simply because they are in response to comments received from interested parties. Id.

In the matter at hand, the Commission stated it was going to continue to apply the existing rules to permittees who had received extensions, and asked for comments on that "tentative" conclusion. NPRM at ¶68. A reasonable reader favoring such a proposed rule would conclude that the Commission intended to adopt such a plan, or a logical variation thereof, and would not feel compelled to comment. The inclusion of the word "tentative" in the NPRM does not itself alter the fact that the final rule is such a substantial and radical departure from the Commission's statement in the NPRM that the APA's goals of allowing the agency to benefit from the experience and input of parties filing comments could not possibly be served. This is particularly so where, as here, the Commission has not received any input as to why the continued application of the existing rules for parties already operating under that regime would be detrimental to either the parties or the public interest.

Courts, in applying the second test, require that the notice be one that "fairly apprised" interested parties of the subject and issues involved. However, similarly to the cases dealing with departure from rulemaking notices, courts will only find parties were fairly apprised and notice was sufficient where departures in the final rule from the proposed rule were in response to submissions from commentors. Consolidated Coal Co. v. Costle, 604 F.2d 239 (4th Cir. 1979), rev'd on other grounds, 449 U.S. 64 (1980); Pennzoil, supra, 645 F.2d 360 (holding APA not violated because FERC had duty to consider submitted comments and modification of proposed rules in response to comments is at the heart of rulemaking process). The Commission has no such justification for its radical departure from its proposed rules and cannot adopt them without giving the public an opportunity to comment on them.

The Commission itself has been involved in cases in which it was argued that the agency failed to comply with the notice and comment requirements of the APA. In those cases in which the Commission was found to have complied, interested parties were provided with notices of departure from proposed rules in published notices of reconsideration or by reference to original proposals in revised proposed rules. See, e.g., National Black Media Coalition v. Federal Communications Commission, 822 F.2d 277 (2nd Cir. 1987) (stating reconsideration contained notice of issue to be considered in new proceeding); Spartan Radiocasting Co. v. Federal Communications Commission, 619 F.2d 314 (4th Cir. 1980) (finding that departure from proposed rule was proposed on reconsideration prompted by submissions from interested parties); United States v. Daniels, 418 F. Supp. 1074 (D.S.D. 1976) (holding rule proposed by Commission and referenced in proposed rules published five years later provided notice of later departure). Here, no such notice was provided to Petitioners and others.

In contrast, the Commission has been found to have failed to provide adequate notice in a case whose facts mirror those of the matter at hand. In National Black Media Coalition v. Federal Communications Commission, 791 F.2d 1016 (2nd Cir. 1986), the Court found that a new round of comments was required as to a final rule where the NPRM clearly stated that the Commission intended to adopt a policy, yet the final rule took a contrary position. The Court stated that although the final rule was a logical outgrowth of the proposed rule, sharp deviation from the proposed rule deprived affected parties of the necessary notice and an opportunity to respond. Id. at 1022. The Court reasoned that since the NPRM stated that the Commission intended to adopt a minority preference policy while the final rule later took a contrary position, the NPRM had failed to apprise fairly interested persons of an intention to act in a manner different from the original policy. Id. at 1022-23.[4] Here, the Commission has undertaken a similar material departure from the proposed rules, failing to apprise interested parties such as Petitioners of its intent to retroactively apply the new rules to existing construction permits.

Thus, the Commission, in radically departing from the proposed rule discussed in the NPRM, has failed to comply with the notice and comment requirements of the APA, and must provide a new comment period as to the application of the new rules to existing construction permits before it can consider, let alone adopt, such rules.

[4] The Court went on to state that if rulemaking proposals could be altered on an agency's whim, an agency could decide to change a rule without alerting affected parties of the scope, impact, or rationale of such a change. National Black Media Coalition, supra, 791 F.2d at 1023.

II RETROACTIVE APPLICATION OF THE FINAL RULES VIOLATES THE APA

The Rulemaking also violates the APA due to the retroactive effect it has on construction permits previously conferred and extended. Thus, as these new rules violate the APA, they cannot be adopted and must be reconsidered.

The Commission decided in the Rulemaking to impose a three-year limit on the length of existing and new construction permits. Rulemaking at ¶83. In detailing the scope of the application of this rule, the Commission stated that permittees operating under extensions granted by application of the existing rules will be subject to forfeiture of their construction permits three years from the date of the initial permit's grant (with only limited extensions of such term), with forfeiture to occur at the expiration of the last permit extension. Id.[5] Thus, the Commission imposed this three-year period not only prospectively, on permits granted *after* the

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[5] In the Rulemaking, the Commission specifically stated that the "pendency of a zoning application before a local zoning board" will not constitute an encumbrance sufficient to toll the running of the three year construction period. Rulemaking at ¶86. This is in sharp contrast to the existing rules which allow for extensions upon a showing of cause, including "delays caused by zoning problems." 47 C.F.R. 73.3534(b)(3). The Commission stated that it based this decision on its belief that three years provides "sufficient time to resolve zoning problems and, therefore . . . a permittee . . . should not receive additional time to construct." Rulemaking at ¶80. However, this conclusion is not entirely valid.

First, the Commission cites no evidence as to why three years is a sufficient time for zoning matters resolved and the Station constructed. In fact, many parties disagreed with that conclusion. See, Comments of Richard L. Harvey, MM Docket No. 98-43, June 11, 1998, at 1-7; Comments of Harry J. Pappas, Stella A. Pappas, and SKYCOM, Inc., MM Docket No. 98-43, June 16, 1998, at 2-14; Comments of Michael Robert Birdsill, MM Docket No. 98-43, June 16, 1998, at 4-5. The Commission chose to ignore these legitimate concerns without justification. Rulemaking at ¶82.

Second, practical experience contradicts this conclusion. Aspen FM, Inc., in dealing with the Bureau of Land Management and Pitkin County, Colorado, and Rancho Palos Verdes Broadcasters, Inc., in dealing with California land use authorities, have found that it can take a far longer period of time to receive local and federal land use approvals than anticipated by the Commission. Further, Aspen FM, Inc. has found that once those approvals were received, it was bound by land use requirements which limited construction to six months per year. See Exhibit A.

effective date of the rule imposing the three year period, but also retroactively, on permits granted *before* the effective date of the rule imposing the three year period. This retroactive application violates the APA.

The final rules contained in the Rulemaking constitute legislative rules. Chadmoore Communications, Inc. v. FCC, 113 F.3d 235 (1997).[6] Courts interpreting the APA have ruled that legislative rules are not to be applied retroactively. Id. at 240 ("the APA requires legislative rules . . . be given future effect only . . . retroactive application is foreclosed by the express terms of the APA"). See also, Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) (holding legislative rules cannot be applied retroactively absent express direction to do so).[7]

In Chadmoore, the court stated that a rule has retroactive effect if it impairs rights a party possessed when it acted. Chadmoore, supra, 113 F.3d at 240-41. In the matter at hand, this is clearly the case. All of the Petitioners possess permits from the Commission for the construction of broadcast facilities and the right, upon a showing of cause, to secure extensions to such

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[6] Legislative rules are those which are adopted pursuant to the notice and comment requirements of the APA. Chadmoore Communications, Inc. v. FCC, 113 F.3d 235, 241 (1997). See also, New York v. Lying, 829 F.2d 346 (2nd Cir. 1987) (legislative rules affect previously existing rights and obligations); Chrysler Corp. v. Brown, 441 U.S. 281 (1979) (legislative rules have the force and effect of law). Legislative rules are generally prospective in application. MCI Telecommunications Co. v. FCC, 10 F.3d 842, 846 (D.C. Cir. 1993).

[7] Legislative rules must adhere to the APA's goal of prospective application, and an agency bears a heavy burden in justifying retroactivity. Mason General Hospital v. Secretary of the Department of Health and Human Services, 809 F.2d 1220, 1224-5 (6th Cir. 1987). The law disfavors retroactive application of legislative rules. Bowen, supra, 488 U.S. at 208; James Cable Partners v. Jamestown, Tennessee, by C. Duncan, 43 F.3d 277, 279 (6th Cir. 1995). Retroactive application of legislative rules only occurs where statutory language requires such a result or Congress expressly authorizes retroactive application; without such instruction, agencies lack the authority to unilaterally retroactively apply legislative rules. See, e.g., Bowen, supra, 488 U.S. at 208, Motion Picture Association of America v. Oman, 969 F.2d 1154, 1157 (D.C. Cir. 1992); Gersman v. Group Health Association, Inc., 975 F.2d 886, 897 (D.C. Cir. 1992), cert. denied, 511 U.S. 1068 (1994). No such requirement exists in this case.

permits under the existing Section 73.3534(b) standards. Their right to obtain further extensions, if necessary, and construct broadcast facilities, will now be impaired by the retroactive application of the three-year limit to construction permits.

For example, Entravision's construction permit for Station K05JY was originally granted in 1994. Under the new rules, this permit will be subject to automatic forfeiture at the end of its extension period, on February 7, 1999, because three years will have passed since the grant of the original permit. This means that the right to secure further extensions thereto, a right Entravision had possessed and acted upon, will not merely be impaired, but will be eliminated by the imposition of the new three-year limit. This is despite the fact that Entravision has made substantial progress in construction, which would have otherwise warranted extension.

This amounts to retroactive application of the new three-year limit to a construction permit granted under rules which imposed no such limit.[8] As the retroactive imposition of these new rules clearly violates the APA, the Commission should reconsider such application.[9]

III THE FINAL RULES VIOLATE THE TAKINGS CLAUSE

The imposition of these new rules also amounts to a taking of property without compensation, in direct violation of the law. Petitioners and others similarly situated have invested a great amount of money in construction of their broadcast facilities in reliance on the

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[8] And, as zoning problems will not qualify as an "encumbrance" sufficient to toll the new three year construction permit limit, and no provision is made for extensions to this three-year limit, permittees are not provided with any possible outlet to avoid retroactive application of the three-year limit. See supra, p.10, fn. 5.

[9] It cannot be argued that no vested right will be affected by the new rule. Petitioners presently operate under valid construction permit extensions received under the existing rule. As such, these extensions are not dependant on any future event, but rather are enjoyed as a result of having fully satisfied the existing rules for an extension. See, e.g., Bickerstaff Clay Products v. Harris County, Georgia, 89 F.3d 1481 (11th Cir. 1996).

Commission's rules governing construction permits. For example, Calipatria paid $28,693.94 to acquire its permit. The existing rules provide for extensions of construction permits under reasonable circumstances, including zoning and land use problems. However, upon the application of the new rules, Petitioners will lose their construction permits at the conclusion of their existing extension periods. With the loss of their permits, Petitioners will lose all monies invested in the construction of the broadcast facilities. This amounts to a taking without compensation in violation of law.

The Fifth Amendment to the Constitution states ". . . nor shall property be taken for public use, without just compensation." U.S. CONST. Amend V. "Property" has been defined as the legally protected bundle of rights associated with an object, and government regulations affecting such rights can amount to a taking of property. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Kirby Forest Indus. v. United States, 467 U.S. 1 (1984).

As the right to construct broadcast facilities amounts to property, regulations affecting such a right may amount to a taking. Courts consider (1) the *economic impact* of the regulation on the claimant; (2) the extent the regulation interferes with *investment-backed expectations*; and (3) the *character of the governmental action* in determining whether a governmental regulation amounts to a taking. Connolly v. Pension Benefit Guaranty Corporation, 475 U.S. 211 (1986). In the matter at hand, each of the three factors indicates a taking has occurred.

The new rules will have the *economic impact* of divesting Petitioners of all monies invested in pursuing construction of broadcast facilities pursuant to permits obtained under the former rules. This will occur due to the fact that, upon the imposition of the new rules, construction permits granted over three years ago and extended under the prior rules will be subject to automatic forfeiture at the conclusion of the last extension. The new rules will

interfere with *investment-backed expectations* because Petitioners invested significant funds in the construction of broadcast facilities in reliance on the expectation that reasonable rules in effect at the time of investment, which provided for extensions of construction permits under reasonable and well defined circumstances, would continue. And, being that the governmental action violates the APA in that it is contrary to notice and comment requirements and retroactive in application, the *character of the governmental action* is not entirely commendable. As such, the final rules amount to a taking without compensation in violation of the law. Connolly, 475 U.S. at 225.

IV PRACTICAL EFFECTS

The Commission stated in the Rulemaking that the new rules are necessitated by the receipt of "large numbers of extension applications every year," and that the public interest will be served by lengthening the time period for construction of a broadcast station and imposing strict criteria for tolling the new extended construction period. Rulemaking at ¶¶79, 90. But the multitude of practical problems created by the new rules cancels out any gains in administrative convenience or service to the public interest. As such, reconsideration is proper.

Parties with zoning and land use problems will be adversely and unfairly affected by the new rules. For example, one of the Petitioners, Aspen FM, Inc., was recently able to resolve zoning problems which had postponed construction of its broadcast facilities and had been the basis for its construction permit extensions. Under the new rules, Aspen's construction permit, due to the fact it is over three years old and is presently under extension, will be subject to automatic forfeiture at the conclusion of its latest extension. However, Aspen faces a local land use ordinance which restricts construction of any sort between October 15 and April 15. This limitation is intended to protect the fragile environment from the effects of construction during

the winter months. Thus, while the clock is winding down on its construction permit, Aspen's hands are tied as it is absolutely prohibited from undertaking construction due to local ordinance until April, and then may only construct during six months of each year. The new rules fail to account for this reasonable land use problem in any way, and penalize Aspen for events wholly beyond its control. The public interest in implementing new broadcast service suffers as a result.

Had Aspen received an unfavorable zoning decision and appealed, another practical effect would have ensued. Although the new rules do not toll the three-year period for zoning problems, litigation does constitute an encumbrance sufficient to toll the period. Rulemaking at ¶86. Were a party such as Aspen be unable to favorably resolve its zoning problems, it might appeal the matter to a court of law, tolling the three-year period, and then obtain a reversal of the zoning decision. However, this favorable resolution would be for naught as, although the clock had stopped during the litigation, the time lost during the now overturned zoning period would be gone forever, and the permittee would be faced with little if any time to construct.

Additionally, that permittee's position would be even more untenable if the favorable judicial resolution to the zoning problem was received while the permittee was subject to a land use ordinance such as the one that Aspen is facing, which limits construction to six months per year. The clock may run out on that permittee before a chance to construct ever occurs. The existing rules contemplate construction permit extensions for events "beyond a permittee's control" and for those parties that make substantial progress in their construction efforts. NPRM at ¶64. The Commission has not provided a sound reason for abandoning this policy.

The situation faced by RPVB displays yet another unfavorable consequence caused by the new rules. RPVB has sought to construct an antenna on Santa Catalina Island, California, for some time now. However, due to environmental concerns, RPVB has had to secure approval

from a multitude of organizations and agencies before construction could begin, including the State of California, the County of Los Angeles, and the Santa Catalina Conservancy, the private entity that controls land use on the island. Three years did not provide for RPVB, and would not provide for any reasonable permittee, enough time in which to secure the approval of all the necessary entities. Yet the time spent securing approvals does not constitute litigation or judicial or administrative review within the contemplation of the new rules, and thus, does not toll the three-year construction period. This is yet another example of how the new rules have practical effects that will frustrate the goals required of the Commission under the Communications Act of 1934, as amended.

RELIEF REQUESTED

Petitioners request the Commission allow for a new notice and comment period regarding the application of the new rules to existing construction permits presently under valid extensions.

However, if no new comment period is provided, Petitioners request the Commission reconsider the Rulemaking and make the following amendments thereto: (1) give the new rules solely prospective application by adhering to the NPRM proposal to continue to apply the existing rules regarding construction permits to those permits outside of their initial periods; or in the alternative (2) broaden the definition of encumbered period under the new rules to include recognition of land use, zoning issues, and local administrative requirements[10] as encumbrances sufficient to prompt tolling of the three-year construction period; or in the alternative (3) allow all existing permittees three years from the effective date of the new rules to complete construction.

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[10] Such as the 6-month per year prohibition against construction faced by Aspen. See supra, p. 10, n. 5, and p. 14.

CONCLUSION

The recently announced rules modifying the length of and procedures for the extension of broadcast facility construction permits should be reconsidered as they violate the law on a number of grounds and also have unanticipated practical effects. The rules differ so significantly from those announced in the notice of proposed rulemaking that a new notice and comment period is required. The retroactive application of the rules to construction permits secured and extended under the existing rules violates the Administrative Procedure Act. The rules also amount to a taking without compensation in violation of the Federal Constitution. And a number of practical effects mitigate against the application of the new rules. As such, reconsideration is proper in this matter.

Respectfully submitted,

ASPEN FM, INC.
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RESOLUTION OF THE BOARD OF COUNTY COMMISSIONERS OF PITKIN COUNTY, COLORADO, GRANTING SPECIAL REVIEW, GMQS EXEMPTION AND RIDGELINE REVIEW TO ASPEN FM, INC.

Resolution No. 98-131

RECITALS

1. Aspen FM, Inc. (hereafter "Applicant") has applied to the Pitkin County Board of County Commissioners (hereafter "Board") for Special Review, GMQS Exemption, and Ridgeline Review to construct a FM radio broadcast tower and equipment building on BLM property on Williams Hill.

2. The property is located on top of Williams Hill and is accessed from Watson Divide Road.

3. This application was reviewed by the Planning and Zoning Commission (hereafter "Commission") at a regular meeting on October 1, 1996, and a recommendation of approval was forwarded to the Board.

4. The Board heard this application at its regularly scheduled meeting of June 24, 1998, at which time evidence and testimony were presented with respect to this application.

5. The Board finds that the Applicant's proposal complies with the Pitkin County Land Use Code, provided that conditions of this document are adhered to.

NOW THEREFORE BE IT RESOLVED by the Pitkin County Board of County Commissioners that it does hereby approve Aspen FM, Inc. application for Special Review, GMQS Exemption and Ridgeline Review, subject to the following conditions:

1. The Applicant shall adhere to all material representations made in the application and in the public meetings.

2. The Applicant shall construct a tower that can accommodate three (3) FM radio station antennas and (6) CMRS antennas. The number of antennas on the tower shall not exceed eighteen (18). A variance from the Board of Adjustment for a 100 foot tower is required prior to the issuance of a building permit.

3. An agreement between Pitkin County, the applicant (Aspen FM, Inc.) and Bureau of Land Management (BLM) shall be reached to accommodate the multi-antenna tower and accessory structure users of the applicants tower on the Williams Hill site, in an equitable fashion, thereby allowing future potential FM radio station and CMRS users in the County to locate at this site. This agreement shall be finalized to the satisfaction of the parties prior to the construction of the 100' antenna tower and accessory structure.

4. Illumination of the tower shall meet FAA and FCC requirements. Excess lighting shall be prohibited.

5. To limit the impacts upon wildlife, construction of the tower and accessory structure shall occur from May 15 to October 15 only. Travel to and from the site for maintenance purposes between October 15 and May 15 shall be on a very limited basis.

6. Removal of native vegetation shall be minimal. The building site shall be revegetated upon the construction completion. This is not intended to prevent the users of the site from maintaining the operations of their stations.

7. The Applicant shall comply with FCC requirements dealing with radio frequency radiation and the limitations on human exposure to radio frequency radiation.

8. Since a portion of the road accessing the site was constructed and is maintained by the County, upon approval of ground access to the site, the applicant shall work with the County to come up with a road maintenance agreement. This agreement shall be done prior to building permit issuance.

9. Ground access to the site shall be secured prior to construction of the tower and equipment storage structure. Helicopter access to the site for construction purposes shall be prohibited. Helicopter access to the site shall be allowed for emergency situations only. Documentation of ground access shall be submitted to the Community Development Department prior to building permit application.

NOTICE OF PUBLIC HEARING PUBLISHED IN THE ASPEN TIMES ON THE 9TH DAY OF MAY, 1998.

APPROVED AND ADOPTED ON THE 22ND DAY OF JULY, 1998.

Vested Rights Notice published in the Aspen Times on August 22, 1998

ATTEST:

Jeanne Jones Lynnee R. Dean
Deputy Clerk and Recorder

BOARD OF COUNTY COMMISSIONERS
OF PITKIN COUNTY, COLORADO

Dorothea Farris
Chair

Date: 8-10-98

APPROVED AS TO FORM:

John Ely
County Attorney

APPROVED AS TO CONTENT:

Cindy Houben,
Community Development Director

Case #P91-96
PID #2467-351

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